Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MARYLAND,
Petitioner,

v.

BRUCE LAMONT DENNIS,
Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a police officer has lawfully stopped a motor vehicle, does the Fourth Amendment permit the officer to order passengers to remain in the vehicle during the course of the encounter?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED ... 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases:

Dennis v. State, 342 Md. 196, 674 A.2d 928 (1996) 1

State v. Wilson, 106 Md. App. 24, 664 A.2d 1, *cert. denied*, 340 Md. 502, 667 A.2d 342 (1995), *cert. granted sub nom. Maryland v. Wilson*, 64 U.S.L.W. 3829 (U.S. June 17, 1996) (No. 95-1268) 6, 7, 8

Whren v. United States, 116 S. Ct. 1769 (1996) 7

Constitutional and Statutory Provisions:

United States Constitution, Amendment IV 2

28 U.S.C. § 1257(a) 2

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No.

STATE OF MARYLAND,

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BRUCE LAMONT DENNIS,

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On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Dennis v. State*, 342 Md. 196, 674 A.2d 928 (1996), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in Appendix A. (App. 1a-20a).

The unreported per curiam opinion of the Court of Special Appeals of Maryland, *Dennis v. State*, No. 387, Sept. Term, 1994 (filed December 9, 1994), affirming the judgment of the Circuit Court for Somerset County, is reproduced in Appendix B. (App. 21a-24a).

The March 16, 1994 ruling of the Circuit Court for Somerset County, Maryland in *State v. Dennis*, Criminal Case No. 94-CR-03526, finding Dennis guilty of disorderly conduct and battery, is reproduced in Appendix C. (App. 25a-26a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing Dennis's convictions was filed on March 13, 1996. The order of the Court of Appeals of Maryland denying the State's motion for reconsideration was filed on May 3, 1996. (App. 27a). This petition is filed within ninety days of the denial of the motion for reconsideration, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On November 27, 1993, Officer Wayne Foskey of the Princess Anne, Maryland Police Department saw a vehicle drive through a red traffic signal. (App. 2a). Officer Foskey and his partner activated the emergency lights on their police car and pursued the vehicle, intending to effectuate a traffic stop. (*Id.*). The driver of the vehicle ignored the emergency lights and increased his speed. (*Id.*). Officer Foskey then pulled alongside the vehicle, shined his flashlight inside, and commanded the driver to pull over. (*Id.*). The driver ignored the police command to stop and began to drive even faster. (*Id.*).

After a lengthy chase during which the driver ignored repeated commands to stop, the police ultimately blocked the vehicle in a private driveway in a residential area where five or six persons were gathered. (*Id.*). Officer Foskey, his partner, and a third officer, Trooper Bettina Collins, approached the vehicle. (*Id.*). Meanwhile, the individuals who were gathered in the area were yelling at the police and "saying things to Dennis and the other subject." (App. 3a). The driver and Dennis, the passenger, opened the car doors and began to exit the vehicle. (App. 2a). Officer Foskey, who was focused on Dennis, "yelled for him to shut the door and stay in the vehicle." (*Id.*). Officer Foskey testified that he did this because the police were "taught for officer's safety to keep all subjects in the vehicle." Ignoring the command to remain in the vehicle, Dennis stepped out of the vehicle and started to walk away. (*Id.*). Officer Foskey again commanded Dennis to stop, but Dennis ignored him and continued to walk away. (App. 2a-3a).

After Dennis ignored a command to get down on the ground, Officer Foskey tackled him. (App. 3a). Dennis struck the officer in the ribs and began fighting with him. (*Id.*). Officer Foskey sprayed Dennis with pepper mace

and managed to get him back into the vehicle. (*Id.*). Dennis was arrested and charged with disorderly conduct and battery, as well with obstructing and hindering a police officer and resisting arrest. (*Id.*).

In finding Dennis guilty of disorderly conduct and battery, the trial court found that Officer Foskey was permitted to command Dennis to remain in the vehicle in order to identify him and ensure officer safety. (App. 24a). Noteworthy to the trial court were the facts that the driver of the vehicle had just engaged the police in a high speed chase and that there were individuals in the immediate area who were "yelling and shouting at the officers." (*Id.*). The trial court also found that because Dennis's refusal to comply with the lawful order of a police officer threatened the public peace, Officer Foskey was justified in physically restraining Dennis. (*Id.*).

Dennis appealed his convictions to the Court of Special Appeals of Maryland, which affirmed in an unreported per curiam opinion. (App. 21a-24a). The Court of Appeals of Maryland granted certiorari to review the judgment of the Court of Special Appeals of Maryland. Maryland's highest court framed the issue this way:

> This case presents the issue of whether a passenger in a vehicle whose driver has been stopped by police for a traffic violation may be convicted of disorderly conduct and battery when, rather than heeding the police command to remain in the vehicle, he walks away from the scene, and subsequently resists police attempts at detention.

(App. 1a).

After determining that Dennis's conduct in disobeying the police command to stop failed to pose "any real danger of a breach of the peace," and, therefore, could not sustain his disorderly conduct conviction, (App. 7a), the court went on to address the lawfulness of Dennis's seizure under *Terry v. Ohio*, 392 U.S. 1 (1968). (App. 9a-18a).

The court reasoned that whether a passenger in a traffic stop situation is subject to stop or arrest depends on the facts and circumstances relating to the passenger, and that the actions of the driver are not automatically attributable to the passenger. (App. 10a). According to the court, the officer's entitlement to detain Dennis turned on whether the officer had "an articulable basis for believing that [he] was somehow involved, other than as a passenger, in the commission of [the driver's] crime." (App. 10a-11a). The court stated that "[i]t is only when the passenger's actions are consistent with those of an accessory or aider and abettor that a police officer has a basis for focusing on and/or charging the passenger." (App. 11a).

The Court of Appeals of Maryland held that Officer Foskey's purpose in commanding Dennis to stop was not to determine whether Dennis had aided and abetted the criminality of the driver. The court pointed to Officer Foskey's testimony that he wanted Dennis to remain in the vehicle for purposes of officer safety because he "did not know if he had contraband, if he had weapons." (App. 14a). The "officer safety" rationale for detaining Dennis, held the court, did not constitute "the requisite reasonable suspicion *Terry* requires." (App. 15a). The court believed that in order for the stop of Dennis to have been lawful, the police must have "articulated a reasonable suspicion that [Dennis] was engaged in the criminal conduct for the investigation of which the stop was made . . . The police officer must intend the stop to be an investigative stop, not just a detention for safety purposes." (App. 14a, 15a).

Because the subjective intention of Officer Foskey in detaining Dennis was to ensure his and the other officers' safety, not to investigate suspected criminal activity on Dennis's part, the Court of Appeals of Maryland concluded that the detention was unlawful. (App. 18a). On this basis, the court reversed Dennis's convictions for disorderly conduct and battery. (App. 18a-19a).

REASONS FOR GRANTING THE WRIT

The issue presented by this case—the right of the police, for safety reasons, to neutralize the potential danger posed by passengers in lawfully stopped vehicles—is pending before this Court in *State v. Wilson*, 106 Md. App. 24, 664 A.2d 1, *cert. denied*, 340 Md. 502, 667 A.2d 342 (1995), *cert. granted sub nom. Maryland v. Wilson*, 64 U.S.L.W. 3829 (U.S. June 17, 1996) (No. 95-1268). Exactly as does *Wilson*, the instant case deals with the authority of the police to take reasonable, de minimis protective measures during traffic stops by ordering the vehicle's occupants to remain inside, or, if the circumstances dictate, to exit the vehicle. In deciding *Wilson*, this Court will resolve whether the Fourth Amendment permits police in the course of a lawful traffic stop to order all occupants out of the vehicle without any particularized suspicion that they pose a threat to the officer's safety.

The same rationale would apply whether the passenger is detained by an order to exit the vehicle, as in *Wilson*, or an order to remain therein, as in this case. In both scenarios, the Fourth Amendment analysis consists of balancing the de minimis intrusion into the passenger's privacy and liberty interests against the State's significant interest in protecting the safety of its police officers. This Court's decision in *Wilson*, therefore, will be dispositive of the instant case.

The Court of Appeals of Maryland wrongly held in this case that the police may not detain a passenger in a lawfully stopped vehicle absent a particularized suspicion that the passenger is engaged in criminal behavior. (App. 14a-18a). A detention of the passenger for safety purposes, held the court, is unlawful inasmuch as it does not constitute "the requisite reasonable suspicion *Terry* requires." (App. 15a). Contrary to the opinion of the

Court of Appeals of Maryland, the balance should tilt in favor of allowing police, on a routine basis, to order passengers to remain in or exit from a vehicle stopped for a traffic violation.[1]

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[1] Regardless of the disposition in *Maryland v. Wilson*, this Court should grant the instant petition and vacate and remand the case in light of this Court's recent decision in *Whren v. United States*, 116 S. Ct. 1769 (1996). In *Whren*, this Court held that the constitutional reasonableness of traffic stops is dependent not on the actual motivations or subjective intentions of the officers involved but, rather, on whether the "circumstances, viewed objectively, justify that action." *Id.* at 1774. This Court stated that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis . . . the Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Id.*

The decision of the Court of Appeals of Maryland directly contravenes this principle insofar as the court deemed determinative not the objective circumstances of the stop but the subjective intention of the police officer effectuating the stop. (App. 14a-15a). The court held: "It is not enough that the record contains facts on the basis of which a police officer could entertain a reasonable, articulable suspicion sufficient to justify an investigatory stop, however. *Terry* requires more. The police officer must intend the stop to be an investigative stop, not a detention for safety purposes." (App. 15a). The decision of the Court of Appeals of Maryland in this regard, therefore, should be reversed in accordance with *Whren*.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari be held pending this Court's disposition in *Maryland v. Wilson*, No. 95-1268, and that it be disposed of in light of the Court's decision in that case.

Respectfully submitted,

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July 19, 1996

APPENDIX

CONTENTS OF APPENDIX

Page

APPENDIX A:

Reported opinion of the Court of Appeals of Maryland, *Bruce Lamont Dennis v. State of Maryland*, 342 Md. 196, 674 A.2d 928 (1996) 1a

APPENDIX B:

Unreported opinion of the Court of Special Appeals of Maryland, *Bruce Lamont Dennis v. State of Maryland*, No. 387, Sept. Term, 1994 (filed December 9, 1994) 21a

APPENDIX C:

Ruling by the Circuit Court for Somerset County, *State of Maryland v. Bruce Lamont Dennis*, Criminal Case No. 94-CR-03526, on March 16, 1994 ..... 25a

APPENDIX D:

Order of Court of Appeals of Maryland denying Motion for Reconsideration, on May 3, 1996 ... 27a

APPENDIX A

Bruce Lamont DENNIS

v.

STATE of Maryland.

No. 18, Sept. Term, 1995.

Court of Appeals of Maryland.

March 13, 1996.

Reconsideration Denied May 3, 1996.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, CHASANOW, KARWACKI, BELL and RAKER, JJ.

BELL, Justice [sic].

This case presents the issue of whether a passenger in a vehicle whose driver has been stopped by police for a traffic violation may be convicted of disorderly conduct and battery when, rather than heeding the police command to remain in the vehicle, he walks away from the scene, and subsequently resists police attempts at detention. The Circuit Court for Somerset County found the petitioner, Bruce Lamont Dennis, guilty of disorderly conduct and battery and sentenced him to two concurrent terms of imprisonment of 45 days.[1] The Court of Special Appeals

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[1] The petitioner was charged not only with battery and (continued...)

affirmed the judgments in an unreported opinion. For the reasons discussed below, we shall reverse.

I.

Officer Wayne Foskey, of the Princess Anne Police Department, testified in the Circuit Court for Somerset County that on November 27, 1993 he saw a vehicle drive through a red traffic signal. Intending to make a traffic stop, Officer Foskey and his partner pursued the vehicle, while flashing the emergency lights on the police car. The driver of the pursued vehicle ignored the lights and increased his speed. Officer Foskey then shined a flashlight into the vehicle and told the driver to pull over. The driver ignored this command as well and again increased his speed. Eventually, the driver pulled the vehicle into a driveway in a residential neighborhood where five or six persons were congregated. At that point, the police, then assisted by a third officer, Trooper Bettina Collins, ended the chase.

Once the vehicle stopped, both the driver and the petitioner attempted to exit the vehicle, according to Trooper Collins's testimony. When the petitioner opened the passenger side door, Officer Foskey "yelled for him to shut the car door and stay in the vehicle." Instead, the petitioner stepped out of the vehicle. He ignored Officer Foskey's command to get back into the vehicle and began walking away without uttering a word. Officer Foskey yelled for the petitioner to stop, but he continued to walk

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[1](...continued)
disorderly conduct, but also with obstructing and hindering a police officer, and with resisting arrest. At the close of the State's case, the trial court granted the petitioner's motion for judgment of acquittal as to these counts.

away.

Trooper Collins testified that while the petitioner and the driver were attempting to exit the vehicle, "[t]here were several subjects in the yard at that time who were also yelling at us and saying things to Dennis and the other subject." Confronted with the petitioner's continued resistance to his commands, Officer Foskey proceeded to "[take the petitioner] to the ground." The petitioner struck Officer Foskey in the ribs with his elbow and began fighting with him. After spraying the petitioner twice with pepper mace, Officer Foskey finally got him back in the car.

The petitioner was tried for, *inter alia*, disorderly conduct and battery.[2] Finding the petitioner guilty, the trial judge stated:

> Gentlemen, considering the totality of the circumstances, the fact that there was a high speed chase, albeit after perhaps running a red light, I think the officer's actions were not unreasonable at all. I think, all Mr. Dennis had to do was stop, stay where he was, let the officer identify him and ensure that there were no problems with the officer's safety, and we wouldn't have been in court. That didn't happen. I think that with the fact that there were other people in the area at that location, according to Trooper Collins, who began yelling and shouting at the officers, that by refusing the [sic] comply with the officer's commands to stay within the car, and when he got out of the car, to get down, I think he violated Article 27, Section 123. He was charged with the correct section by refusing the lawful order of a police officer, the refusal of

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[2] *See supra*, note 1.

> which could have threatened the public peace. Likewise, as to Count #1, I think there was an unlawful touching. I think the officer was justified in doing what he did when he physically restrained Mr. Dennis, the defendant, from leaving the area. It all could have been avoided if Mr. Dennis had complied with the officer's command, which was not unreasonable.
>
> I'm convinced beyond a reasonable doubt that Mr. Dennis is guilty of Count #1, Battery, and Count #2, Disorderly Conduct.

II.

In examining the petitioner's disorderly conduct conviction, we must first consider the nature of the crime itself. Disorderly conduct is addressed in Maryland Code (1957, 1992 Repl. Vol.), Article 27, § 123, and provides, in pertinent part:

> A person may not act in a disorderly manner to the disturbance of the public peace, upon any public street, highway, alley, park or parking lot, in any city, town, or county in this State, or at any place of public worship, or public resort or amusement in any city, town or county in this State, or in any store during business hours, or in any elevator, lobby or corridor of any office building or apartment house having more than three separate dwelling units, or in any public building in any city, town or county of this State.

In *Drews v. State*, 224 Md. 186, 167 A.2d 341 (1961), *vacated on other grounds and remanded*, 378 U.S. 547, 84 S.Ct. 1900, 12 L.Ed.2d 1032 (1964), *judgments reinstated and reaffirmed*, 236 Md. 349, 204 A.2d 64 (1964), *appeal dismissed and cert. denied*, 381 U.S. 421, 85 S.Ct. 1576, 14 L.Ed.2d 693 (1965), this Court stated that

> [t]he gist of the crime of disorderly conduct under Sec. 123 of Art. 27, as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area. 3 Underhill, *Criminal Evidence*, Sec. 850 (5th Ed.), adopts as one definition of the crime the statement that it is conduct 'of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.' Also, it has been held that failure to obey a policeman's command to move on when not to do so may endanger the public peace, amounts to disorderly conduct.

Id. at 192, 167 A.2d at 343-44. Thus, while not explicitly stated in the statute, this Court has found there to be a "police command" aspect of disorderly conduct. To be guilty of disorderly conduct on this basis, however, there must be a sufficient nexus between the police command and the probability of disorderly conduct. These commands cannot be "'purely arbitrary and ... not calculated in any way to promote the public order.'" *Id.* at 193, 167 A.2d at 344 (quoting *People v. Galpern*, 259 N.Y. 279, 181 N.E. 572, 574 (1932)). *See also Harris v. State*, 237 Md. 299, 303, 206 A.2d 254, 256 (1965) (holding that "[a] failure to obey a reasonable and lawful request by a police officer fairly made to prevent a disturbance to the public peace constitutes disorderly conduct.").

Our prohibition of arbitrary police commands is consistent with the Supreme Court's holding in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965). In that case, the Court struck down a city ordinance that made it "'unlawful for any person to stand or loiter upon any street or sidewalk ...

after having been requested by any police officer to move on.'" *Id.* at 90, 86 S.Ct. at 213, 15 L.Ed.2d at 179 (quoting § 1142 of the Birmingham General City Code). The Court stated that citizens should not be governed "'by the moment-to-moment opinions of a policeman on his beat[,]'" but rather by clearly defined laws. *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 536, 579, 85 S.Ct. 466, 469, 13 L.Ed.2d 487, 501 (1965)). The Court further stated that law based on "[i]nstinct with its ever-present potential for arbitrarily suppressing First Amendment liberties ... bears the hallmark of a police state." *Id.* at 90-91, 86 S.Ct. at 213, 15 L.Ed.2d at 179 (footnote omitted).

A brief review of some of the instances in which Art. 27, § 123 violations premised on the refusal to comply with police commands have been found are instructive, by way of comparison with the case *sub judice*, to show that Maryland case law demands more affirmative conduct by a defendant than occurred in this case before disobeying a police order will be deemed a breach of the peace. For example, in *Hallengren v. State*, 14 Md.App. 43, 286 A.2d 213 (1972), the defendant was among a crowd of people engaged in riotous behavior. While the police attempted to disperse the crowd, the defendant exhorted the crowd "to resist and kill the police." *Id.* [at] 45-46, 286 A.2d at 215. In *Luthardt v. State*, 6 Md.App. 251, 251 A.2d 40 (1969), the defendant encouraged a crowd to burn down the home of an African American family. The police ordered the defendant to desist from his conduct and when he failed to do so he was arrested. *Id.* at 253-55, 251 A.2d at 42-43. In *Bacheller v. State*, 3 Md.App. 626, 240 A.2d 623 (1968), *rev'd on other grounds*, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970), the defendants, Vietnam War demonstrators, entered a United States recruiting station and demanded that their anti-war posters be displayed. After being physically ejected from the building, they began blocking the sidewalk, attracting a

crowd of onlookers, including some individuals who reacted in a hostile manner to the demonstrators. The demonstrators were ordered by the police to move on and after failing to do so were arrested. *Id.* at 630-31, 240 A.2d at 625-26. *See also Sharpe v. State*, 231 Md. 401, 403, 190 A.2d 628, 630-31, *cert. denied*, 375 U.S. 946, 84 S.Ct. 350, 11 L.Ed.2d 275 (1963).

In addressing the disorderly conduct conviction, the State contends that the refusal of the petitioner to stay in the vehicle once it was stopped, coupled with the refusal to comply with Officer Foskey's subsequent commands, constituted disorderly conduct. The State argues, in that regard, that "*Drews* and *Harris* instruct that a conviction for disorderly conduct will lie whenever a person disobeys a lawful police command to stay -- or go -- when such a command is designed to avoid a breach of the peace." That argument proves unavailing in the instant case because the testimony lacks the evidentiary foundation on which to base the petitioner's conviction. As noted earlier, Trooper Collins testified that the persons gathered in the yard where the driver's vehicle was stopped were yelling at the police and saying things to the driver and the petitioner. We find it highly significant, however, that the State has proffered no evidence as to the genesis of the yelling, what was being said, even whether the persons were reacting in favor of the petitioner or the police.

In sum, the circumstances described by the State in no way lend themselves to the notion that the petitioner's conduct created any real danger of a breach of the peace. As we see it, the quantum of evidence necessary to sustain a disorderly conduct conviction under Art. 27 § 123 is much greater than the State offered, or suggests, in this case.

III.

A.

As part of its effort to justify Officer Foskey's actions in seizing the petitioner, the State cites *Barnhard v. State*, 325 Md. 602, 602 A.2d 701 (1992), for the proposition that "'[w]here a crime may have been committed and a *suspect* or *important witness* is about to disappear, it seems irrational to deprive the officer of the opportunity to "freeze" the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken.'" *Id.* at 615, 602 A.2d at 708 (quoting *Watkins v. State*, 288 Md. 597, 605, 420 A.2d 270 (1980) (quoting, in turn, ALI, A Model Code of Pre-Arraignment Procedure § 110.2 (Commentary 1975))) (emphasis added). *Barnhard*, however, may be distinguished from the instant case. In *Barnhard*, police officers testified that, when responding to a stabbing incident, they encountered the defendant who volunteered to show the police where the knife used in the stabbing had been discarded. 325 Md. at 605, 602 A.2d at 703. On that basis, they considered the defendant to be a "material witness," and, thus, sought to detain him. *Id.* at 605-06, 602 A.2d at 703.

In the instant case, by contrast, there is neither testimony nor evidence in the record indicating that the police considered the petitioner either an "important witness" to the criminal conduct of the driver or a suspect in the case. In fact, as will be discussed *infra*, the basis for the petitioner's detention had nothing to do with either such status. Therefore, the record does not reveal that it was necessary to "freeze" the situation.

B.

The State concedes the petitioner's right to resist an unlawful arrest in this case; however, it argues that Officer Foskey was effectuating a stop pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Accepting the State's premise equating "lawfulness" with a stop that does not violate the Fourth Amendment under *Terry*, the petitioner counters that his seizure violated *Terry*. Thus, the issue framed by the parties concerns the scope and application of *Terry*.

To be sure, Officer Foskey's tackling of the petitioner amounted to a "seizure." *See Terry*[,] 392 U.S. at 16, 88 S.Ct. at 1877, 20 L.Ed.2d at 903 ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."). The question in this case then becomes whether the seizure was legal. Our analysis in this area is guided by the contours of the Fourth Amendment. Under *Terry*, it is permissible for a police officer to "stop" a person briefly if the officer has a reasonable, articulable suspicion that criminal activity is afoot. The reasonableness of such an intrusion, however, "is to be assessed against an objective standard -- whether 'the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate.'" *Anderson v. State*, 282 Md. 701, 705, 387 A.2d 281, 283 (1978) (quoting *Terry*, 392 U.S. at 21-22, 88 S.Ct. at 1880, 20 L.Ed.2d at 906).

A *Terry* stop is an investigatory stop. It is justified on the basis of the general interest in "effective crime prevention and detection." *Terry*, 392 U.S. at 22, 88 S.Ct. at 1880, 20 L.Ed.2d at 906. The rationale underlying a *Terry* stop is that, when the circumstances are appropriate, a police officer may stop a person "for purposes of investigating possibly criminal behavior even though there

is no probable cause to make an arrest." *Id.* at 22, 88 S.Ct. at 1880, 20 L.Ed.2d at 907. Whether appropriate circumstances exist depend[s] upon "the facts and circumstances ... detailed before the trial judge ..." and whether a reasonably prudent person would have concluded that, under those circumstances, a detention for further investigation was justified. *Id.* at 28, 88 S.Ct. at 1883, 20 L.Ed.2d at 910. Because the purpose of the stop is investigatory and must be justified by the facts and circumstances detailed to the court, it follows that the police officer must intend that the stop be investigatory and the stop, in fact, must be for that purpose.

In a traffic situation, the police officer's recitation of the facts leading up to the stop of an automobile ordinarily will suffice to supply probable cause for arrest, in the case of an offense for which arrest is appropriate, or for a stop in the case of other offenses. This circumstance is so because it is the action of the driver of the automobile that is at issue. The presence of a passenger in the car does not change the analysis. The actions of the driver are not automatically, or even necessarily, attributable to the passenger, however. Whether the passenger is subject to arrest or stop will depend upon the facts and circumstances as they relate to the passenger. Thus, as in this case, the officers' articulation of the circumstances surrounding the stop of the automobile revealed that they had probable cause to arrest the driver for fleeing and eluding. In the absence of additional information focusing on the passenger's actions, that articulation did not provide probable cause to believe that his passenger was also engaged in that fleeing and eluding. The question, therefore, is whether there was a basis to further investigate the passenger's involvement in the criminal act for which the driver was being arrested. The answer to that question depends upon whether there was an articulable basis for believing that the passenger was

somehow involved, other than as a passenger, in the commission of that crime.

There ordinarily is no reason to believe that a passenger in a vehicle is guilty, as an accessory or aider and abettor, of the traffic offense with which the driver may be charged. This is true even when the offense is fleeing and eluding. *See e.g. Tasco v. State*, 223 Md. 503, 509, 165 A.2d 456, 459 (1960), *cert. denied*, 365 U.S. 885, 81 S.Ct. 1036, 6 L.Ed.2d 195 (1961); *Judy v. State*, 218 Md. 168, 176, 146 A.2d 29, 33 (1958). It is only when the passenger's actions are consistent with those of an accessory or aider and abettor that a police officer has a basis for focusing on and/or charging the passenger. When, for example, the passenger in an automobile in which the driver is charged with fleeing from the police, flees after the automobile is stopped, it is possible for there to arise at least a reasonable suspicion that the passenger was the driver's accessory or aider and abettor.[3]

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[3] Maryland Code (1977, 1992 Repl.Vol., 1994 Cum.Supp.), § 21-904 of the Transportation Article provides, in pertinent part:

> (b) *Failing to stop vehicle.* -- If a police officer gives a visual or audible signal to stop and the police officer is in uniform, prominently displaying the police officer's badge or other insignia of office, a driver of a vehicle may not attempt to elude the police officer by willfully failing to stop the driver's vehicle.
>
> (c) *Fleeing on foot.* -- If a police officer gives a visual or audible signal to stop and the police officer is in uniform, prominently displaying the police officer's badge or other insignia of office, a driver may not attempt to elude the police officer by fleeing on foot.

By its terms, this section is addressed only to drivers. Section

(continued...)

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[3](...continued)

26-101, however, provides, as relevant:

> (a) *Persons committing violations.* -- Any person who commits a violation of the Maryland Vehicle Law, whether as a principal, agent, or accessory, is guilty of the violation.
>
> (b) *Persons attempting to commit violations.* -- Any person who attempts to commit a violation of the Maryland Vehicle Law, whether as a principal, agent, or accessory, is guilty of the violation.
>
> (c) *Persons conspiring to commit violations.* -- Any person who conspires to commit a violation of the Maryland Vehicle Law, whether as a principal, agent, or accessory, is guilty of the violation.
>
> (d) *Persons aiding others in commission of violations.* -- Any person who aids another in the commission of a violation of the Maryland Vehicle Law, whether as a principal, agent, or accessory, is guilty of the violation.
>
> (e) *Persons abetting others in commission of violations.* -- Any person who abets another in the commission of a violation of the Maryland Vehicle Law, whether as a principal, agent, or accessory, is guilty of the violation.
>
> (f) *Persons inducing others to commit violations.* -- Any person who intentionally induces another to commit a violation of the Maryland Vehicle Law is guilty of the violation.
>
> (g) *Persons causing others to commit violations.* -- Any person who intentionally causes another to commit a violation of the Maryland Vehicle Law is guilty of the violation.
>
> (h) *Persons coercing others to commit*

(continued...)

See Price v. State, 227 Md. 28, 33, 175 A.2d 11, 13 (1961); *Tasco*, 223 Md. at 509, 165 A.2d at 459. In that circumstance, the passenger's flight provides a basis for a *Terry* stop to determine the reason for the flight,[4] *i.e.*, whether he or she, in fact, aided or abetted the driver.

Walking away from an automobile, even one stopped by the police, is not usually considered to be flight unless the person walking away does so in a manner indicative of flight. In some circumstances, however, it may be considered flight, albeit a slow flight, *see Burks v. State*, 96 Md.App. 173, 186, 624 A.2d 1257, 1264 (1993) (flight has no speed requirement). Where a person walks away in defiance of a police officer's request to stop, persistence in walking away may be considered flight.

A *Terry* stop was not what Officer Foskey intended.

---

[3](...continued)

> *violations*. -- Any person who intentionally coerces another to commit a violation of the Maryland Vehicle Law is guilty of the violation.
> (i) *Persons permitting others to commit violations*. -- Any person who intentionally permits another to commit a violation of the Maryland Vehicle Law is guilty of the violation.
> (j) *Persons directing others to commit violations*. -- Any person who intentionally directs another to commit a violation of the Maryland Vehicle Law is guilty of the violation.

Read together, it is clear that § 21-904 also applies, *inter alia*, to passengers who act as aiders and abetters.

[4] The trial judge acquitted the petitioner of resisting arrest, but apparently found that a *Terry* stop was justified when he stated:

> I think the officer was justified in doing what he did when he physically restrained Mr. Dennis, the defendant, from leaving the area.

During his direct examination, the prosecutor asked Officer Foskey why he ordered the petitioner, who had begun to exit, to remain in the vehicle, to which Officer Foskey responded,

> [w]ell, we're taught for officers' safety to keep all subjects in the vehicle. Also, we did not know, the way the subject was acting, we did not know if he had contraband, if he had weapons.... [A]nd for our safety, we always ask all subjects to stay in the vehicle.

These statements are the extent of Officer's [sic] Foskey's testimony as to why he acted as he did toward the petitioner. The State acknowledges that this testimony is Officer's [sic] Foskey's explanation of his behavior.[5] It does not contend, as required by *Terry*, that the testimony articulated a reasonable suspicion that the petitioner was engaged in the criminal conduct for the investigation of which the stop was made. Thus, Officer Foskey detained the petitioner, rather than let him leave the scene, "for officers' safety." Inasmuch as he did not, as the State

---

[5] In its brief, the State observed:

> Both the driver and Dennis tried to get out of the car, and both were ordered to stay seated in the car.... Officer Foskey explained that this is done (and was done in this case) for safety's sake. Foskey said: "[W]e're taught for officers' safety to keep all subjects in the vehicle. Also, we did not know, the way the subject was acting, we did not know if he had contraband, if he had weapons..." This is not an unreasonable, or atypical, precaution. *See New York v. Class*, 475 U.S. 106, 115 [106 S.Ct. 960, 966-67, 89 L.Ed.2d 81] (1986) (commenting that "[k]eeping the driver of a vehicle in the car during a routine traffic stop is probably the typical police practice.").

recognized, articulate the requisite reasonable suspicion *Terry* requires,[6] it is clear that Officer Foskey did not contemplate an investigatory stop with the petitioner as its object.

C.

In the instant case, there may well have been sufficient evidence in the record from which Officer Foskey could have possessed a reasonable, articulable suspicion that the petitioner aided and abetted the criminality of the driver. Had he, in fact, intended to make a *Terry* stop, a different result might be appropriate. It is not enough that the record contain facts on the basis of which a police officer could entertain a reasonable, articulable suspicion sufficient to justify an investigatory stop, however. *Terry* requires more. The police officer must intend the stop to be an investigative stop, not just a detention for safety purposes.

Terry requires that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906 (footnote omitted). Indeed, such an articulation is a condition precedent to a judicial determination that a reasonable suspicion justified the officer's conduct. *Cf. Graham v. State*, 325 Md. 398, 404, 601 A.2d 131, 134 (1992) (stating that "a detention short of arrest is lawful if the police have a reasonable, articulable suspicion for such action."). There is some

---

[6] As discussed *supra*, Trooper Bettina Collins also testified in the trial court. She, too, failed to articulate a reasonable suspicion for a *Terry* stop based on the petitioner's conduct.

indication in case law that the officer must *specifically articulate* reasonable suspicion for a *Terry* stop, and in the absence of a specific articulation by the officer, the court is not justified in reaching a conclusion that the surrounding circumstances justified a reasonable suspicion for a *Terry* stop. *Jones v. State*, 319 Md. 279, 287, 572 A.2d 169, 173 (1990) ("[P]olice officers are entitled to make a forcible stop if the officer has reasonable grounds for doing so. He must be able to point to specific and articulable facts that warrant such an intrusion to be within the legal parameters of the Fourth Amendment."); *State v. Wilson*, 106 Md.App. 24, 29, 664 A.2d 1, 3 (1995) ("It is ... the officer who must do the articulating, not the Attorney General by way of appellate afterthought."); *Gibbs v. State*, 18 Md.App. 230, 238, 306 A.2d 587, 592 (1973) ("It is ... clear that the policeman must be able to articulate specific facts justifying both the 'stop' and, quite independently, the 'frisk.'"). *See also State v. Jamison*, 482 N.W.2d 409, 413 (Iowa 1992); *State v. Cripps*, 533 N.W.2d 388, 391-92 (Minn. 1995). Of course, the stated reason for the stop must be objectively reasonable. *See Doctor v. State*, 596 So.2d 442, 447 (Fla.1992 [sic]).

Other courts have rejected the stated reason for the stop of a suspect and, yet, upheld the stop as objectively reasonable. *United States v. Cardona-Rivera*, 904 F.2d 1149, 1153-54 (7th Cir.1990 [sic]); *United States v. Hawkins*, 811 F.2d 210, 214-15 (3rd Cir.1987 [sic]); *State v. Mitchell*, 80 Wash.App. [sic] 143, 906 P.2d 1013, 1016 (1995). *See State v. Bolosan*, 78 Hawai'i [sic] 86, 890 P.2d 673, 683 (1995). In each case, the officers testified to the facts that the court determined to be controlling and, in each case, those facts related to the subject being stopped. In this case, the observations and testimony concerning the events leading up to the stop all focused on the actions of the driver of the automobile; this testimony in no way detailed what the petitioner did to warrant his

detention. We need not, however, decide in the instant case, whether the officer must articulate specifically the basis for the stop in order to permit the court to conclude that a *Terry* stop was justified.

In the case *sub judice*, the record reflects that once the driver stopped the fleeing vehicle, the petitioner got out and began walking away from the scene, disregarding Officer Foskey's command to stop. Officer Foskey could have concluded from that conduct that the petitioner was fleeing the scene. While fleeing from a police officer or disregarding a police officer's command to stop, in and of itself, does not give rise to probable cause or even a reasonable suspicion sufficient to justify the use of force to detain the person fleeing, *see Watkins v. State*, 288 Md. 597, 604, 420 A.2d 270, 274 (1980), where that person is a passenger in the automobile as the driver attempts to flee from and elude the police, a police officer reasonably and objectively could entertain a suspicion that he was an active and willing participant with the driver in that attempt. In the instant case, however, that suspicion was not what prompted the officer to detain the petitioner. It was solely because the officer felt he would be safer if the petitioner were detained.

In the trial court, the prosecutor argued:

> Your Honor, I think Officer Foskey had an absolute right to stop this man and ask him to at least identify himself, and then make a decision at that point in time.
>
> You've got two people who run through a red light, which is not a major crime. It happens every day. I'm sure very few people get stopped for it. But following that you've got a police car that gets behind the vehicle, attempts to stop it, his emergency lights go out but he stayed with the car. A second police car with emergency lights comes behind it .... It's got two police vehicles

> trying to stop it. It's obvious to everybody, if you believe the officers' testimony, that they're trying to stop the car to the point they even shine a flashlight in the car to get it stopped. The car stops in somebody's yard and both people bail out.
>
> I think there's all kinds of reasons for suspicion in the officer's mind. He's got to do something. He's got to at least identify the two people in the vehicle. He's got to run that car to see whether or not it's stolen, and to see what the reason is for the flight. He's got all kinds of suspicions in his mind....

In so doing, the prosecutor, perhaps to compensate for Officer Foskey's failure to do so, articulated a basis on which Officer Foskey *could have* entertained a suspicion. The prosecution's articulation of a reasonable suspicion, however, is unavailing because no *Terry* investigative stop was intended. The prosecutor, rather than the officer, articulating a reasonable suspicion, justified by the record, on which the officer may have acted, may not be sufficient for a *Terry* stop. It clearly is not sufficient in the instant case, where a stop for the officers' safety, rather than a *Terry* investigative stop, was intended. There is no articulated reason why the officers would be safer by detaining the petitioner, rather than simply allowing him to walk away from the scene.

So that our position is clear, we are not holding today that a passenger in an automobile whose driver has fled from and eluded the police has an unfettered right to ignore a police officer's commands to stop. We simply hold that to justify detaining the passenger, the officer must have a reasonable suspicion that the passenger engaged in criminal behavior and must have intended to conduct further investigation based on that suspicion.

IV.

Based on the foregoing analysis, we must also dismiss the battery conviction. Because Officer Foskey did not make a *Terry* stop, he is not entitled to the presumption that the stop was legal. It follows, therefore, that Officer Foskey's forcible detention of the petitioner amounted to an arrest and was illegal.[7] This Court has upheld the right of a person to resist an unlawful arrest. *See Barnhard v. State*, 325 Md. 602, 614, 602 A.2d 701, 707 (1992); *Rodgers v. State*, 280 Md. 406, 410, 373 A.2d 944, 946, *cert. denied*, 434 U.S. 928, 98 S.Ct. 412, 54 L.Ed.2d 287 (1977); *Williams v. State*, 204 Md. 55, 64, 102 A.2d 714, 718 (1954); *Sugarman v. State*, 173 Md. 52, 57, 195 A. 324, 326 (1937). Resistance includes the right to use "any reasonable means, including force, to effect [an] escape." *Barnhard*, 325 Md. at 614, 602 A.2d at 707. Thus, we hold that the petitioner is not guilty of the battery of Officer Foskey.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO VACATE THE JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY.

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[7] The State quite correctly points out that the use of force is permissible, if necessary, to effectuate a *Terry* stop. *See, e.g., Lee v. State*, 311 Md. 642, 667, 537 A.2d 235, 247 (1988) (holding that a "brief, though forceful, detention of petitioners was constitutionally justified by reasonable suspicion under the circumstances."); *Terry v. Ohio*, 392 U.S. 1, 7, 88 S.Ct. 1868, 1872, 20 L.Ed.2d 889, 897 (1968) (stating that "Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two....").

COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY SOMERSET COUNTY.

APPENDIX B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 387

September Term, 1994

BRUCE LAMONT DENNIS

v.

STATE OF MARYLAND

Bloom,
Wenner,
Davis,

JJ.

Per Curiam

Filed: December 9, 1994

Argued before BLOOM, WENNER and DAVIS, JJ.

Appellant, Bruce Lamont Dennis, was convicted at a bench trial in the Circuit Court for Somerset County of battery and disorderly conduct. Sentenced to two concurrent terms of 45 days, he brought this appeal, in which he asks:

I. Was the evidence sufficient to sustain the conviction for disorderly conduct?

II. Did the trial court erroneously convict Appellant of battery?

Finding no error, we shall affirm the judgments of the circuit court.

FACTS

On 27 November 1993, a police officer observed a car in which appellant was a passenger run a red light. After the driver ignored the officer's emergency lights and order to pull over, the car accelerated and a high-speed chase ensued. The car eventually stopped in a private driveway.

Ignoring the officer's order to remain in the car, appellant got out of the car. Appellant then began walking away. When the officer attempted to restrain him, appellant struggled with the officer, and struck him several times before the officer subdued him.

Although appellant was convicted of battery and disorderly conduct, he was acquitted of obstructing and hindering and resisting arrest.

DISCUSSION

In reviewing the sufficiency of the evidence, we must determine

> whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Webber v. State, 320 Md. 238, 248, 577 A.2d 58 (1990) (citations omitted).

I.

In Maryland, it is clear that a conviction for disorderly conduct must be supported by evidence that an accused refused to obey an officer, if the refusal may endanger the public peace. *Briggs v. State*, 90 Md.App. 60, 69-70, 599 A.2d 1221 (1992). In the case at hand, the State presented evidence that appellant had failed to obey an officer's order to remain in [appellant's] automobile following a high speed chase. Moreover, appellant's disobedience tended to incite a crowd that had gathered and had begun to exhibit hostility to the officer. There was no error.

II.

Appellant also contends that the officer had attacked him when he was "simply walking away in plain view . . . . " Appellant seems to overlook the fact that ignoring the officer's reasonable request to remain in the car posed a threat to the public. Thus, the officer was justified in using such force as was reasonably necessary to subdue appellant. Again, there was no error.

III.

Appellant finally contends that his conviction for battery was inconsistent with his acquittal of resisting

arrest. Upon carefully reviewing the transcript, we conclude that appellant was acquitted of resisting arrest because the trial judge was not certain that appellant had been arrested.[1]

According to *Barnhard v. State*, 325 Md. 602, 611, 602 A.2d 701 (1992), "[a]n arrest is effected (1) when the arrestee is physically restrained or (2) when the arrestee is told of the arrest and submits." The evidence adduced at trial indicated that appellant was not arrested until after the battery had occurred, when the officer succeeded in restraining him. *State v. Huebner*, 305 Md. 601, 608 (1986). The acquittal on the charge of resisting arrest appears to have been based on the trial court's erroneous belief that one cannot be guilty of resisting arrest unless he was told that he was under arrest. But acquitting appellant of resisting arrest on that ground is not fatally inconsistent with convicting him of battery, because appellant had no right to strike an officer who was lawfully attempting to arrest him.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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[1] THE COURT: No. As to the Third Count, the motion is granted.

Resisting arrest presents a little bit of a problem because there was no testimony that he ever told him that he was under arrest.

STATE'S ATTORNEY: But I think the actions are there, though.

THE COURT: Well, is it enough?

. . .

STATE'S ATTORNEY: . . . I mean, do I have to tell you that you're under arrest if I have my hands on you and I'm trying to cuff you?

THE COURT: I'm not sure.

APPENDIX C

Trial court's ruling of March 16, 1994 in the Circuit Court for Somerset County, The Honorable Daniel M. Long, *State of Maryland v. Bruce Lamont Dennis*, Criminal Case No. 94-CR-03526

* * *

THE COURT: Gentlemen, considering the totality of the circumstances, the fact that there was a high-speed chase, albeit after perhaps running a red light, I think the officer's actions were not unreasonable at all. I think, all Mr. Dennis had to do was stop, stay where he was, let the officer identify him and ensure that there were no problems with the officer's safety, and we wouldn't have been in court. That didn't happen. I think that with the fact that there were other people in the area at that location, according to Trooper Collins, who began yelling and shouting at the officers, that by refusing the [sic] comply with the officer's commands to stay within the car, and when he got out of the car, to get down, I think he violated Article 27, Section 123. He was charged with the correct section by refusing the lawful order of a police officer, the refusal of which could have threatened the public peace. Likewise, as to Count #1, I think there was an unlawful touching. I think the officer was justified in doing what he did when he physically restrained Mr. Dennis, the defendant, from leaving the area. It all could have been avoided if Mr. Dennis had complied with the officer's command, which was not unreasonable.

I'm convinced beyond a reasonable doubt that Mr. Dennis is guilty of Count #1, Battery, and Count #2, Disorderly Conduct.

* * *

APPENDIX D

BRUCE LAMONT DENNIS * In the

* Court of Appeals

v. * of Maryland

* No. 18

STATE OF MARYLAND * September Term, 1995

ORDER

The Court having considered the motion for reconsideration, for stay of mandate and for withdrawal of opinion in the above-captioned case, it is this 3rd day of May, 1996,

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

ROBERT C. MURPHY
Chief Judge

Supreme Court U.S.
FILED
AUG 12 1996
CLERK

(2)

No. 96-112

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF MARYLAND,

Petitioner,

vs.

BRUCE LAMONT DENNIS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN E. HARRIS
Public Defender of Maryland

GEORGE E. BURNS, JR.*
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Counsel for Respondent

* *Counsel of Record*

QUESTION PRESENTED

Did the Court of Appeals correctly hold that the evidence was insufficient to sustain the convictions for disorderly conduct and battery?

INDEX

TABLE OF CONTENTS

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT OF CERTIORARI 2

The Court of Appeals Correctly Held That the Evidence was Insufficient to Sustain Convictions for Disorderly Conduct and Battery.

TABLE OF AUTHORITIES

Cases

Clark v. Jeter, 486 U.S. 456 (1988) 4

Dunaway v. New York, 439 U.S. 979 (1979) 5

Estelle v. McGuire, 502 U.S. 62 (1991) 4

Jackson v. Virginia, 443 U.S. 307 (1979) 5

Maryland v. Wilson, 106 Md.App. 24, 664 A.2d 1
cert.denied, 340 Md. 502, 667 A.2d 342 (1995)
cert.granted sub nom, 64 U.S.L.W. 3829 (1996) 5

Patterson v. New York, 432 U.S. 197 (1977) 5

Preiser v. Newkirk, 422 U.S. 395 (1975) 4

Whren v. United States, 116 S.Ct. 1769 (1996) 5

No. 96-112

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF MARYLAND,

Petitioner,

vs.

BRUCE LAMONT DENNIS,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Bruce Lamont Dennis, by counsel, Stephen E. Harris, Public Defender of Maryland, and George E. Burns, Jr., Assistant Public Defender, Office of the Public Defender, respectfully request that the Court deny the Petition for Writ of Certiorari filed by the State of Maryland as there has been no showing that the question presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

Respondent was convicted of disorderly conduct and battery. He was sentenced to concurrent terms of imprisonment of forty-five days.

Officer Wayne Foskey of the Princess Anne Police Department testified that on November 27, 1993, he was in a patrol car with another officer (Reid) when he saw a

vehicle drive through a stop light. Foskey pursued the vehicle, but the driver of the vehicle ignored Foskey's emergency lights and increased his speed. Foskey shined a flashlight into the car and told the driver to pull over. This command was ignored. During the pursuit, another police car, driven by Trooper Bettina Collins joined the pursuit. Eventually, the vehicle was driven into a driveway and stopped.

Respondent was the passenger and opened the passenger's door of the stopped vehicle. Foskey "yelled at him to shut the car door and stay in the vehicle."

> A. He continued to open the door and stepped out of the vehicle. I again hollered for him to get back in the vehicle and shut the door. He totally ignored me. He shut the door of the vehicle and started walking away, at which time I yelled for him to stop. He still totally ignored me, continued moving away, and at this time, I took him to the ground.
>
> Q. And then what happened?
>
> A. At that time, Mr. Dennis struck me in the ribs with his elbow and began fighting and I ended up spraying him with pepper mace. It took a tussle with him to get him to the car. When I got him to the car, I had to spray him with pepper mace again to get him in the car.

According to Trooper Collins,

> Mr. Dennis and the operator of the vehicle ignored our commands at the time. There were several subjects in the yard at the time who were also yelling at us and saying things to Dennis and the other subject.

REASONS FOR DENYING CERTIORARI

The question posed by Petitioner, "[w]hen a police officer has lawfully stopped a motor vehicle, does the Fourth Amendment permit the officer to order passengers to remain in the vehicle during the course of the encounter?" asks for nothing more than

an advisory opinion. The simplest means of testing whether the question posed presents a case or controversy is to answer the question as the Petitioner desires and test the result.

As to the disorderly conduct, the Court of Appeals held:

> In addressing the disorderly conduct conviction, the State contends that the refusal of the petitioner to stay in the vehicle once it was stopped, coupled with the refusal to comply with Officer Foskey's subsequent commands, constituted disorderly conduct. The State argues, in that regard, that "*Drews* and *Harris* instruct that a conviction for disorderly conduct will lie whenever a person disobeys a lawful police command to stay -- or go -- when such a command is designed to avoid a breach of the peace." That argument proves unavailing in the instant case because the testimony lacks the evidentiary foundation on which to base the petitioner's conviction. As noted earlier, Trooper Collins testified that the persons gathered in the yard where the driver's vehicle was stopped were yelling at the police and saying things to the driver and the petitioner. We find it highly significant, however, that the State has proffered no evidence as to the genesis of the yelling, what was being said, even whether the persons were reacting in favor of the petitioner or the police.
>
> In sum, the circumstances described by the State in no way lend themselves to the notion that the petitioner's conduct created any real danger of a breach of the peace. As we see it, the quantum of evidence necessary to sustain a disorderly conduct conviction under Article 27, Section 123, is much greater than the State offered, or suggests in this case. *Petition*, Appendix at 7a.

Even assuming the officer had the right to order Respondent to stay in the vehicle, Respondent would still not be guilty of disorderly conduct because there was no evidence that Respondent's "conduct created any real danger of a breach of the peace."

As to the battery, Foskey testified that only after Respondent exited the vehicle, shut the door, started to walk away, and ignored an order to stop, did Foskey assault Respondent. Trooper Collins stated that "both subjects did exit against our commands, so we asked them just to get down." Thus, Foskey acted because Respondent walked away -- whether Respondent was entitled to get out of the car is irrelevant. Indeed, Foskey could not have acted in any other way. If Respondent had stopped rather than walked away, there would have been no basis for Foskey's attack unless the Court were to hold that the passenger could not leave the vehicle, and if he does, the police may punish him by throwing him to the ground.

In sum, answering the question posed by the Petitioner in the affirmative would not change the result in this case. "The exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy" and, therefore, federal courts lack the power to render advisory opinions. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

Even if the Petitioner had correctly formulated the question, *i.e.* the question asked of and answered by the Court of Appeals -- was the evidence sufficient? -- the Petitioner would be in no better position because there would be no federal issue. This Court has repeatedly said that federal courts do not sit to decide questions of state law. Federal courts do not "reexamine State court determinations on State law questions." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Similarly, this Court said in *Clark v. Jeter*, 486 U.S. 456, 460 (1988), the "question of how to interpret the Pennsylvania statute ultimately is a matter of State law."

While the United States constitution requires that a conviction must rest on evidence sufficient to establish proof beyond a reasonable doubt, *see Jackson v. Virginia*, 443 U.S. 307 (1979), the question of whether evidence is sufficient is ordinarily a state law question. The Court of Appeals concluded that the evidence failed to establish that Respondent's conduct -- right or wrong -- created a real danger of a breach of the peace as required by the Maryland disorderly conduct statute.

In the context of the battery, it is clear that Foskey, in tackling Respondent, was arresting him. *See Dunaway v. New York*, 439 U.S. 979 (1979) (objective standard to determine if police conduct constituted an arrest). The Court of Appeals also noted that there was nothing to suggest that the tackling and macing were part of a "stop." Under Maryland law, Respondent was entitled to resist the unlawful arrest. Moreover, the extent and existence of affirmative defenses are normally questions of state law. *See Patterson v. New York*, 432 U.S. 197 (1977).

The Petitioner has failed to raise any question which justifies review by this Court. Petitioner implicitly recognizes this and does not request that this Court hear this case. Instead, the Petitioner attempts to obscure the lack of merit in its position by requesting the Court to dispose of the case in light of *Maryland v. Wilson*, 106 Md.App. 24, 664 A.2d 1, *cert.denied*, 340 Md. 502, 667 A.2d 342 (1995), *cert.granted sub nom*, 64 U.S.L.W. 3829 (1996), and *Whren v. United States*, 116 S.Ct. 1769 (1996). In *Whren*, this Court concluded traffic stops must be only objectively reasonable. It was never disputed in this case that the traffic stop was proper. Thus, *Whren* has no bearing on the instant case. *Wilson* is limited to the question of whether the police may order a

passenger out of a car during a lawful traffic stop. Nothing in *Wilson* remotely involves the sufficiency of the evidence of convictions pertaining to a passenger who is attacked by the police while walking away in plain view without any basis for believing that he has violated, he is violating, or he will violate the law.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition by denied forthwith.

Respectfully submitted,

Stephen E. Harris
Public Defender of Maryland

George E. Burns, Jr.
Assistant Public Defender

Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,	*	
Petitioner	*	
vs.	*	No. 96-112
BRUCE LAMONT DENNIS,	*	
Respondent	*	

* * * * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **9th** day of **August**, **1996**, three copies of Respondent's Brief in Opposition and Motion for Leave to Proceed in Forma Pauperis were mailed to Gary E. Bair, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 200 St. Paul Street, Baltimore, Maryland 21202, counsel for Petitioner.

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(3)

Supreme Court, U.S.
FILED
AUG 19 1996
CLERK

No. 96-112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MARYLAND,
Petitioner,

v.

BRUCE LAMONT DENNIS,
Respondent.

On Petition For Writ of Certiorari To The Court of Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

REPLY ARGUMENT 1

I. THE PETITION PRESENTS A CASE OR CONTROVERSY. 1

II. THE ISSUE PRESENTED BY THIS CASE IS NOT THE EVIDENTIARY SUFFICIENCY OF DENNIS'S CONVICTIONS 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases:

Brower v. County of Inyo, 489 U.S. 593 (1989) 4
Brown v. Texas, 443 U.S. 47 (1979) 4
Graham v. Connor, 490 U.S. 386 (1989) 4
United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., 508 U.S. 439 (1993) 3
Terry v. Ohio, 392 U.S. 1 (1968) 4

Constitutional Provision:

U.S. CONST. amend. IV 1, 2, 4, 5

REPLY ARGUMENT

In his brief in opposition, Dennis raises two new points not addressed in the petition for writ of certiorari. First, he argues that Maryland's petition fails to present a case or controversy and that it calls for this Court to issue an advisory opinion. (Brief in Opp. 2-4). Second, he argues that the real issue presented by this case is one of evidentiary sufficiency, not one implicating the Fourth Amendment. (Brief in Opp. 4-5). Contrary to Dennis's first assertion, an affirmative answer to the question presented in the petition would indeed change the result in this case. His second argument mischaracterizes the issue here and is belied by the Court of Appeals of Maryland's opinion itself.

I.

THE PETITION PRESENTS A CASE OR CONTROVERSY.

Dennis was convicted of disorderly conduct and battery, but those convictions were reversed because the appellate court misinterpreted the Fourth Amendment. (Pet. for Cert. App. 1a-2a). Nonetheless, Dennis argues that neither conviction will be affected by a decision by this Court on the question presented by Maryland's petition, because both convictions are controlled by interpretations of state law. Insofar as the disorderly conduct conviction is concerned, Dennis is correct. His conviction of battery, however, will be directly impacted by this Court's decision because the Maryland Court of Appeals' reversal of that conviction was based on Fourth

Amendment grounds.

Dennis relies on an incorrect premise in arguing that his battery conviction would be unaffected by this Court's holding that Officer Foskey acted lawfully in ordering him to remain in the vehicle. The tackle of Dennis by Officer Foskey, which the Court of Appeals of Maryland characterized as an unlawful arrest, (Pet. for Cert. App. 19a), flowed directly from the officer's command that Dennis remain in the vehicle. The subsequent commands to stop and get on the ground came in response to Dennis's refusal to comply with the initial command. Officer Foskey's tackling of Dennis simply effectuated Foskey's show of authority and was necessitated by Dennis's disobedience. Dennis's resistance to the tackle, therefore, which led to his conviction for battery, was to a lawful show of authority.

To characterize Officer Foskey's show of authority as a series of discrete and unconnected events, as did the Court of Appeals of Maryland, (Pet. for Cert. App. 19a), and as does Dennis, (Brief in Opp. 4-5), is tantamount to saying that the police have no authority to enforce lawful orders that are ignored or disobeyed. If such were the case, the police could only arrest individuals who fully cooperated with the arrest procedure and could only execute search warrants where the occupants willingly allowed entry.

Officer Foskey's tackling of Dennis was a reasonable means of enforcing his ignored verbal command to remain in the vehicle, not an illegal arrest. It follows that if the order to remain in the vehicle was lawful, the very foundation upon which the Court of Appeals of Maryland based its reversal of Dennis's battery conviction would disappear. Dennis concedes as much when he states: "If

Respondent had stopped rather than walked away, there would have been no basis for Foskey's attack *unless the Court were to hold that the passenger could not leave the vehicle, and if he does, the police may punish him by throwing him to the ground.*" (Brief in Opp. 4) (emphasis added).[1] Because Dennis's battery conviction will be impacted directly by this Court's decision, a case or controversy exists. *See generally United States Nat'l Bank of Or. v. Independent Ins. Agents of Am.*, 508 U.S. 439, 446 (1993) (case or controversy exists where there is "pursuance of an honest and actual antagonistic assertion of rights by one [party] against another" and where "valuable legal rights [would] be directly affected to a specific and substantial degree" by Court's decision) (internal quotation marks and citations omitted).

II.

THE ISSUE PRESENTED BY THIS CASE IS NOT THE EVIDENTIARY SUFFICIENCY OF DENNIS'S CONVICTIONS.

Dennis argues that the question whether evidence is legally sufficient to sustain a conviction ordinarily turns on an interpretation of state law principles and that, therefore, this case presents no issue "which justifies review by this Court." (Brief in Opp. 5). This contention is specious.

The Court of Appeals of Maryland framed the issue in

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[1] Dennis incorrectly labels as "punishment" that which is nothing more than a reasonable response to a failure to comply with a lawful police command.

the first sentence of its opinion as follows: "This case presents the issue of whether a passenger in a vehicle whose driver has been stopped by police for a traffic violation may be convicted of disorderly conduct and battery when, rather than heeding the police command to remain in the vehicle, he walks away from the scene, and subsequently resists police attempts at detention." (Pet. for Cert. App. 1a). The Court recognized that a determination of "whether the seizure was legal" turned on "the scope and application of *Terry*"[2] and that the "analysis in this area is guided by the contours of the Fourth Amendment." (*Id.* 9a). Thus, Dennis's assertion that this case presents purely a state law question of evidentiary sufficiency is erroneous.

A case virtually indistinguishable from the instant case in this regard is *Brown v. Texas*, 443 U.S. 47 (1979). In *Brown*, the defendant was convicted of violating a state statute making it a crime to refuse to provide one's name and address to a police officer. *Id.* at 49. The issue before this Court was whether the police officer's stopping the defendant and requiring him to identify himself violated the Fourth Amendment. *Id.* at 50. Although the validity of the defendant's conviction under state law was at issue, the Fourth Amendment was implicated by virtue of the seizure leading to his arrest. *Id. Accord Graham v. Connor*, 490 U.S. 386, 394 (1989) (where an excessive force claim arises in the context of an arrest or stop of a citizen, the Fourth Amendment guarantee against unreasonable seizures is implicated); *Brower v. County of Inyo*, 489 U.S. 593, 598-99 (1989) (same).

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[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

In short, Dennis's protestations to the contrary notwithstanding, this case presents the federal question of whether the Fourth Amendment permits police who have lawfully stopped a vehicle for a traffic violation to order passengers to remain in the vehicle during the encounter. And, for the reasons stated in Maryland's petition, this question merits review by the Court.

CONCLUSION

For the foregoing reasons and for the reasons stated in its petition for writ of certiorari, Maryland respectfully requests that the petition be held pending this Court's disposition in *Maryland v. Wilson*, No. 95-1268, and that it be disposed of in light of the Court's decision in that case.

Respectfully submitted,

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